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U.S. COURT ROOM

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June 8, 2005

Honorable Pat Miller, Chairman  
Tennessee Regulatory Authority  
ATTN: Sharla Dillon, Dockets  
460 James Robertson Parkway  
Nashville, TN 37243-5015

Re: Petition of Frontier Telecommunications, Inc. for Declaratory Ruling; Docket No  
04-00379

Dear Chairman Miller:

Enclosed for filing in the above-captioned docket please find the original and 13 copies of the Initial Brief of Ben Lomand Rural Telephone Cooperative, Inc. Thank you for your assistance. If you have questions, please do not hesitate to contact me

Sincerely,



H. LaDon Baltimore  
Attorney for Ben Lomand Telephone  
Cooperative, Inc.

LDB/dcg  
Enclosures

cc: Guilford Thornton, Jr., Esq.  
Melvin Malone, Esq.

BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE

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IN RE:

PETITION OF FRONTIER  
COMMUNICATIONS, INC.  
FOR DECLARATORY RULING

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)  
) DOCKET NO 04-00379

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**INITIAL BRIEF OF BEN LOMAND RURAL TELEPHONE COOPERATIVE, INC.**

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Ben Lomand Rural Telephone Cooperative, Inc., by and through its undersigned counsel and in accordance with the procedure set forth in the Hearing Officer's Order Establishing Briefing Schedule of May 27, 2005, respectfully files its initial brief.

As determined at the status conference held April 27, 2005 and reflected in the order of May 27, 2005, this initial brief is to address the threshold issues contained in Ben Lomand Rural Telephone Cooperative, Inc.'s Motion to Dismiss, including jurisdiction, and is not to address or attempt to resolve the dispute of this matter on its merits. As a brief to address the threshold issues, this brief's purpose is not to argue whether telephone cooperatives can have competition. If Ben Lomand Rural Telephone Cooperative, Inc.'s Motion to Dismiss is granted, further issues are moot.

Ben Lomand Rural Telephone Cooperative, Inc. supports the Preliminary Brief of the Intervening Cooperatives.

**I. INTRODUCTION**

On October 26, 2004, Frontier Communications, Inc. ("Frontier") filed the Petition of Frontier Communications, Inc. for Declaratory Ruling that it can provide competing services in

territory currently served by Ben Lomand Rural Telephone Cooperative, Inc. On December 8, 2004, Ben Lomand Rural Telephone Cooperative, Inc. filed its Answer and Motion to Dismiss. At a regularly scheduled Authority conference held on December 13, 2004, the panel assigned to this docket voted to appoint the general counsel or his designee as Hearing Officer. Subsequent to that date, several other telephone cooperatives have been granted intervention in this matter. A status conference was held on April 27, 2005, at which time it was determined that the parties would first file briefs for the panel's consideration addressing the threshold issues contained in Ben Lomand Rural Telephone Cooperative, Inc.'s Motion to Dismiss. The remainder of the procedural schedule would depend upon the decision by the panel regarding such threshold issues.

## **II. ARGUMENT**

The Tennessee Regulatory Authority has limited jurisdiction over telephone cooperatives since telephone cooperatives are specifically exempted from the definition of a public utility regulated by the Authority. Tenn. Code Ann. §65-4-101(6)(E). The Authority's jurisdiction over telephone cooperatives is limited to (1) determining, under Tenn. Code Ann. §65-29-102, the question of whether a particular area already has "reasonably adequate telephone service" in order to determine if a municipality or other area may be served by a telephone cooperative, and (2) under Tenn. Code Ann. §65-29-130, "to establish a telephone cooperative's territorial boundaries and to resolve territorial disputes." *Op Atty Gen #90-83, August 27, 1990 at p 2* (The Opinion did not address the issue of whether or not the TRA has the jurisdiction to consider "reasonably adequate telephone service" when a telecommunications service provider desires to offer service in a cooperative's service area. Ben Lomand Rural Telephone Cooperative, Inc.

reserves the right to address this issue if this matter is not dismissed.) This matter does not involve the question of whether Ben Lomand Rural Telephone Cooperative, Inc., or any other telephone cooperative, is attempting to offer service in a municipality or any other area outside of its cooperative territory. Furthermore, this matter does not involve "territorial boundaries" or "territorial disputes." This issue is whether Frontier can offer telecommunications services that duplicates the services of Ben Lomand Rural Telephone Cooperative, Inc. A territorial boundary or dispute involves the encroachment or non-encroachment of boundary lines of cooperatives and other telecommunications service providers such as Frontier.

Simply put, in this case Frontier does not seek a declaration of where the territorial boundaries between Ben Lomand Rural Telephone Cooperative, Inc. and Frontier are located. Rather, Frontier seeks a declaration that no territorial lines exist at all between the two companies. That is a far different question and one that does not fall within the TRA's jurisdiction under Tenn. Code Ann. §65-29-130.

**A. Frontier's petition seeks a declaration that no territorial boundaries exist between Frontier and Ben Lomand Rural Telephone Cooperative, Inc., which is a declaratory ruling not within the purview of Tenn. Code Ann. §65-29-130.**

The TRA's jurisdiction over telephone cooperatives such as Ben Lomand Rural Telephone Cooperative, Inc. is limited. Telephone cooperatives such as Ben Lomand Rural Telephone Cooperative, Inc. are specifically excluded from the jurisdiction of the Tennessee Regulatory Authority under Tenn. Code Ann. §65-4-101(6)(E). An exception to this exclusion is contained in Tenn. Code Ann. §65-29-130. This code section limits the jurisdiction of the Authority over telephone cooperatives to the "**sole and specific purposes** .. [of] .. (1) the

establishment of territorial boundaries; (2) the hearing and determining of disputes ... relative to and concerning territorial disputes. ..." Tenn. Code Ann. §65-29-130(a) (emphasis added).

The above cited code section's purpose is reiterated in the very Attorney General's opinion cited by Frontier as giving jurisdiction to the TRA in this matter. In Opinion No 90-83 of the Office of the Attorney General, August 27, 1990, the question was asked if a telephone cooperative could offer services in a municipality which was already receiving service from another telecommunications service provider. The Attorney General opined that the TRA's jurisdiction over a telephone cooperative was limited to determining whether service in an area had "reasonably adequate telephone service available" which, if it did not, a telephone cooperative could obtain a franchise to offer service in that area. The Attorney General further opined that the provisions of Tenn. Code Ann. §65-29-130 limited the Authority's jurisdiction to resolving territorial disputes between a telephone cooperative and any other entity rendering telephone service. Again, the operative phrase is "territorial disputes."

The issue in this matter is whether Frontier can offer telecommunications services where Ben Lomand Rural Telephone Cooperative, Inc. is offering services. This is a different question from whether there is a territorial or boundary dispute. A territorial or boundary dispute involves where boundaries are established and the encroachment and non-encroachment of boundary lines. A "boundary" is defined as anything indicating a line or confine.<sup>1</sup>

An example of such a dispute would involve a cooperative or other telecommunications service provider offering telephone service to a customer or small group of customers near the

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<sup>1</sup> *Funk & Wagnel's Standard Desk Dictionary*, 1984 (Harper & Row Publishers, Inc.)

boundary of each's territory. A territorial or boundary dispute would then involve who can legally provide telecommunication services to such customers, i.e., in whose territory are such customers? A territorial or boundary dispute necessarily must mean that exclusive territories exist. By contrast, Frontier's petition asks the TRA to determine that no boundaries exist at all between the parties - which, again, is much different than a boundary dispute and a matter well beyond the limited jurisdiction that the General Assembly conferred upon the TRA.

If the Tennessee General Assembly had meant more than a boundary dispute, it would have used other language. In Tenn. Code Ann. §65-29-102 wherein authority is given to telephone cooperatives to furnish telephone service in rural area, the General Assembly uses the term "furnishing telephone service." No such phrase is contained in §65-29-130.

If the Tennessee General Assembly had meant for the TRA to have jurisdiction over additional telecommunications service providers in a telephone cooperative's service area, the General Assembly could have said so. It could have used the phrases "furnishing telephone service" from §65-29-102, or similarly, "telecommunications service," "competing telecommunications service providers," in addition to or instead of "territorial boundaries" and "territorial disputes." If the General Assembly had meant for the TRA to have jurisdiction in a matter such as this docket, it would have said something to the effect of "furnishing an additional telephone services in an area served by a telephone cooperative," or "the providing of service by additional or competing telecommunications service providers or an incumbent local exchange carrier." None of these phrases are contained in T.C.A. Section 65-29-130.

Nowhere in §65-29-130, or elsewhere in Chapter 29 or in Title 65, does the General Assembly grant the TRA additional jurisdiction over telephone cooperatives. If the General

Assembly had wanted to confer any additional jurisdiction, it could have said so, especially with the rewrite of the Tennessee telecommunications law with the 1995 Telecommunications Act, Chapter 408 of the Public Acts of 1995. In fact, the General Assembly did just the opposite: the General Assembly continued the exemption of telephone cooperatives from the jurisdiction of the TRA except as set forth in Tenn. Code Ann. §65-29-130 or §65-29-102.

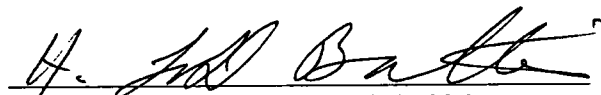
**B. Opinion No. 90-83 of the Office of the Attorney General does not confer jurisdiction upon the TRA in this matter.**

Frontier, in its response to Ben Lomand Rural Telephone Cooperative, Inc.'s Motion to Dismiss, cites Opinion No. 90-83 of the Office of the Attorney General as affirming jurisdiction by the TRA in this matter. However, the Opinion's facts are distinguishable from those in this matter. In such opinion, the question was asked if a telephone cooperative, upon receiving a franchise from a municipality, could offer telephone service in such municipality which already had telephone service. The Attorney General opined that the municipality alone could not grant authority to the telephone cooperative. In such a factual situation, the TRA had limited authority under a combination of Tenn. Code Ann. §§65-29-102, and 65-29-130. A municipality can authorize a franchise, but the TRA also has the authority to approve the franchise. The above cited Opinion concluded that under a combination of 65-29-102 and 65-29-130, for a telephone cooperative to offer service in an area where there is already telephone service, the TRA must decide the ultimate question of whether "reasonably adequate telephone service is available" to prohibit the telephone cooperative's entrance into such municipality. Such is the jurisdiction of the TRA according to the Attorney General; there is no jurisdiction under Tenn. Code Ann §§65-29-102 and 65-29-130 in this matter.

### III. CONCLUSION

The Tennessee Regulatory Authority must dismiss the petition of Frontier Communications, Inc. because the petition is not within the jurisdiction of the Tennessee Regulatory Authority as set forth in Tenn. Code Ann. §65-29-130.

Respectfully submitted,



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### Certificate of Service

The undersigned hereby certifies that on this the 8<sup>th</sup> day of June, 2005, a true and correct copy of the foregoing has been forwarded via first class U. S. Mail, hand delivery, overnight delivery, or facsimile transmission to the following.

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